Supreme Court, U.S.
FILED
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MS. MAXIE SMITH,
Petitioner,

vs.

KAISER PERMANENTE MEDICAL GROUP, INC.,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals, First Appellate District, Division 1

PETITION FOR WRIT OF CERTIORARI

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PETITIONER
IN PROPRIA PERSONA

35 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a doctor's authority should end when a patient no longer trusts the methods of medical treatments being administered by him/her and thus requests a specialist for his/her physical disorder, and then be denied.

2. Whether it should be mandatory for doctors to recommend tests and have laboratory screening of the patient before medication is administered when a patient is in fear of the loss of a vital organ.

3. Whether an HMO should be denied the privilege of an agreement between the subscriber and itself when there is proof that the HMO had given false statements to creditors and others repeatedly regarding the subscriber's legal position, status, rights and privileges with their health care provider.

4. Whether "malpractice" should be the definition, when a patient expects the benefits of quality service from his/her doctors, specialists and technicians only to find that the specialist that was recommended to him/her did nothing different from the regular medical practitioner to specialize, and continued the same substandard method of treatment that had gone before him/her, and by so doing caused the patient to lose a vital organ which might have been saved if certain standards had been adhered.

5. Whether the public should have the right to know before subscribing to an HMO if the health care provider's advertisements and promises *("Kaiser Putting Your Health First, And Easy Access To Specialists"*) are within the keeping of their claims and promotions.

6. Whether the HMO has the right to refuse to pay the carrier (ambulance) because their board members decided after treatment had been administered that the

problem wasn't serious enough and allowed the debt to go unpaid' thus ruining the patient's financial well being , when the fire department, the first on the scene, evaluated the situation and made a decision to call an ambulance because it was felt that the situation was critical enough to need immediate attention.

7. Whether the courts should be allowed to rule consistently in favor of the HMO when there is continuous and clear evidence of misconduct and violations from the HMO.

8. Whether any HMO should have so much influence that they can abuse and nearly ruin a person financially without penalty (not even a hand slap) then turn around a second time and attempt the same ruination on the same person without conscious or thought of consequences.

9. Whether any HMO at fault should have the right to decide the method in which a situation is settled (arbitration) or the amount of payment due a person for the disruption of that person's life, the sorrow and fears, the needless sleepless nights, the wrongful denials, and the harassment that was designed to antagonize that person which they caused.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVERSED

All Parties appear in the caption of the case.
Maxie Smith (Individual Petitioner)

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STATEMENT OF JURIDICTIONAL GROUNDS AND REFERENCE TO OFFICAL REPORTS OF OPINION

1. The Court of Appeal of the State of California in and for the First Appellate District of Northern California rendered a final decision in this case on December 24, 1997, certifying that the decision entered on October 24, 1997 had become final. On December 24, 1997, in the Supreme Court of Appeal for the State a California, a Petition for Writ of Prohibition and/or Mandamus was filed.

2. On December 30, 1997, the Supreme Court of California transferred the matter to the Court of Appeal, First Appellate District. On January 8, 1998, the California Court of Appeal, First Appellate District, Division One, by the Court: the Petition for Writ of Mandate or Prohibition is denied thereby ordering that Kaiser's motion for an order compelling arbitration of all claims or cause of action against Kaiser in this action is granted.

No._____

IN THE
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OCTOBER TERM, 1997

MS. MAXIE SMITH,

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KAISER PERMANENTE MEDICAL GROUP, INC.,

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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

1. Course of proceedings and disposition in Court below. This is an appeal from the decision of the First Appellate District, Division One for the Court of Appeal of the State of California. affirming a decision of the Alameda County Superior Court in favor of Kaiser Permanente Motion to Stay the decision of the Superior Court Order Granting Kaiser Permanente the right to arbitrate all issues brought against them

2. Statement of Facts. On December 24, 1993, Maxie Smith (Kaiser Member #7957592) was found in the hallway outside of her apartment suffering from toxic

fixation. A neighbor found her nearly unconscious and called an ambulance (Medical Regional Systems Ambulance Service). Her neighbor, Mary Shea, Attorney, stayed with her until the ambulance took her to the Emergency Room at Kaiser.

On April 19, 1994, Ms Smith's mother, Mrs. Juanita Page, who was co-tenant in the condominium that Ms Smith occupies, was diagnosed with diabetes and kidney failure. She could no longer be responsible for her share of the payment in the condominium and gave Ms. Smith a Quit Claim Deed to the condominium to remove herself. Since it was a financial emergency, Ms. Smith immediately tried to secure a loan to refinance the condominium. In her effort to obtain a loan, it was discovered that Kaiser had not paid Medical Regional System for her transport to the hospital in December , 1993, nearly a year later. Ms. Smith's investigation revealed that Kaiser Permanente denied the fact of her membership to Medical Regional.

Ms. Virginia Body issued a letter to Ms Smith to submit to her creditors (they finally paid the bill after much threatening .in December 1994) stating that the delayed payment was a typographical error. However, there is nothing in Kaiser's records regarding Ms Smith that supports the oversight or the denial of Ms Smith's membership enrollment.

Kaiser's deceptive, fraudulent, false information to Medical Regional System caused Ms. Smith great stress. She tried to sell her condominium, and when that failed she attempted to secure a loan, which due to her false credit report, also failed. It is proven that too much stress can lower a person's resistance to infection. Ms. Smith developed an infection in her right ear and began to lose hearing in that ear. It took six months, after persistence on

Ms Smith's part, for Kaiser to recommend her to a specialist (ENT). She was treated from February 1995 through June 15 by various doctors who insisted that her hearing loss in her right ear was no more than a sinus infection and an ordinary cold. When she was finally recommended to a specialist, her condition was characterized as routine by their ENT, Doctor Frederick Byl.

On June 7, 1995, Doctor Byl ordered an audiological evaluation of Ms Smith's hearing and discovered a difference of hearing, left greater than the right ear. He then recommended her for an MRI testing Friday , July 7. Ms Smith returned for an appointment Tuesday July 18 for Doctor Byl's evaluation of the MRI testing. She was told by him that he was unable to explain the loss of Ms Smith hearing, but recommended that she return in approximately three months for an appointment (Thursday October 5 with Ms Linda Hanna, Audio Logical Services) to see if her hearing improved or worsened. No other tests were prescribed at that time in hopes of saving the hearing in her left ear.

Information in Ms. Smith's medical records from Kaiser Permanente (page 49) was found that Ms Smith had (R) Otitis Medis (an inner ear infection) for which they prescribed Erythromycin (an antibiotic) and Entex CA (a decongestant). Then as noted in the medical records, the patient continued to complain about her loss of hearing in her ears and was then prescribed Prednisone (a steroid and anti-inflammatory) and other decongestants. In looking through Ms Smith medical records, her physicians (Dr. Sharpton, Dr. Susan Wakerlin and Dr. Robert Noriega) had not ordered any lab screening on Ms Smith since January 23, 1994. That lab screening appeared normal.

In January 1996, Ms. Smith sought a private physician, Doctor Nieberding M.D., F.A.C.S., who ordered laboratory screening on January 19, 1996. This report showed an elevated WBC 17, normal is 3.5-12.5; elevated neutrophi of 12.24, normal is 4.5; lymphs 3.75, normal is 1.5; and monos 85, normal is 0.0-0.5. The above information obtained by Ms Smith's private physician is indicative of an infection which Kaiser never explored. So one can deduce in comparing the lab work into 1996, an infectious process could have been occurring.

Kaiser's negligence of Ms Smith's health compares to the case of Engalla vs. Kaiser, where Kaiser's lack of timely lab work cost Mr. Engalla his life. Again one can deduce that their negligence to perform laboratory screening on Ms Smith cost her her hearing.

In protest to Kaiser's treatment of her financial dilemma and hearing loss, Ms. Smith purchased an ad in the Oakland Tribune and passed out flyers to solicit other unsuspecting victims who had been treated unfairly by Kaiser. The flyers were passed out near the Kaiser hospital medical center. About a week later, Ms. Smith received a call from a woman who only identified herself as a Kaiser representative. She wanted to know if Ms Smith would share the names of the people who responded to the flyers. Ms Smith refused.

Approximately six months later, Ms Smith began receiving statements claiming Kaiser had discovered that during the time she visited Dr. Byl and had the MRI testing, she was not covered as a member and that she owed a sum of $2074.94 with interest $224.55, for a total due of $2299.50. Once again, nothing in Kaiser's records supports these allegations.

ARGUMENT

I. CONSTITUTIONAL STANDING.

For years, Kaiser has caused considerable loss and sorrow in a number of lives because they have not taken the time to really care. Nothing could be further from the truth when Kaiser states, "Putting Your Health First and Easy Access to Specialist". Engalla lost his life trusting that statement, and Ms Smith lost her hearing. The difference between the two being that Engalla was insured through his employer, and Ms Smith was a private subscriber -- the only difference. The service was the same.

Their cases are only two in a million throughout this country who have suffered at the hands of HMOs. Their power and influence has gained so much political recognition, along with their shrewd legal counsel who are able to reduce a serious crime to a minor incident, which of course is arbitrational. Some of the responses that Ms Smith received from the results of the flyers was sad and typical of Kaiser's behavior.

One letter from a Ms. Jamison who also need the ambulance service, suffered the same denial from Kaiser to pay the carrier. She filed a suit in small claims court, and of course she lost. She paid $150.00 to arbitrate, and of course she lost. In another case, Mrs. Jill Valentine's two year old son was running and fell, resulting in a severe deep cut in his forehead which instantly started to bleed and swell profusely. Her husband knew that he couldn't drive his stick shift car to the hospital and keep the pressure on their son's head to stop the bleeding, so he called the fire department. By the time the fire department arrived, the child's eyes started closing and his head started to bobble. It was at this point that the fire department made the decision to dispatch an ambulance.

The child ended up with six stitches internally and seven stitches externally. Once again Kaiser refused to pay the ambulance, and once again the debt was taken to collection to damage her credit standing. She appealed to Kaiser to pay the invoice, but of course, Kaiser refused. This case didn't go to arbitration -- not everyone has $150.00.

These are just two of many stories of those who have suffered at the hands of Kaiser. Very few of Kaiser's subscribers, when pursuing Kaiser legally, has found real justice. Ms. Smith will continue to pursue these unfair tactics until she is heard. Legislators need to consider the consequences of their decisions before they allow the cunning and shrewd lobbyists with ulterior motives to persuade them to make laws that are bias against the public. Kaiser could not get away with some of the things that they do to their subscribers if the laws with the loop holes were closed, such as "ALL CLAIMS".

II. A STATUTORY SCHEME GONE MAD.

While Congress has allowed certain laws that provides the HMO with a defense advantage, the HMO has gone too far in their enforcing decisions.

A. DID GRAHAM V. SCISSOR-TAIL HAVE THE RIGHT TO CHALLENGE THAT IN ADDITION TO THE GENERAL DOCTRINE OF UNCONSCIONABILITY DERIVED FROM CONTRACT LAW, THE ARBITRATION AFFILIATED WITH ONE OF THE PARTIES TO THE CONTRACT WAS UNCONSCIONABLE?

Knox Kleen Health Care Service Plan Act which provides among other things that all contracts made in connection with a health plan service be: fair, reasonable, and consistent with the objective of that statue. (HEALTH

AND SAFETY CODE, & 1367, subd. (h)) HMO's are therefore especially obligated not to impose contracts on their subscribers that are one sided and lacking in fundamental fairness.

Though HMO's are especially obligated not impose contracts on their subscribers that are one-sided and lacking in fundamental fairness, it seems that Kaiser Permanente consistently operates with unreasonable advantages. Ms. Smith in good faith and according to her contract, depended on Kaiser to be fair and reasonable. Instead Kaiser concealed her membership from Medical Regional Systems in a fraudulent attempt to justify the rejection of Medical Regional Systems' invoice regarding the transport that they provided for Ms. Smith in an emergency situation. In addition they issued a false statement to Ms. Smith regarding the timeliness of their payment to Medical Regional, when in fact Collection Bureau of San Jose in a letter stated that they called Kaiser three times for payment and told Medical Regional Ms. Smith was not a member. In the letter it was stated "the delay was due to a technical oversight".

B. ENGALLA V. KAISER WHEREBY CIV. PROC., & 1281.2, SUBD. WAS IT CONSTRUED TO MEAN THAT A PETITION TO COMPEL ARBITRATION IS NOT TO BE GRANTED WHEN THERE ARE GROUNDS FOR RESCINDING THE AGREEMENT?

Engalla repeatedly presented Kaiser with complaints symptomatic of respiratory disease. On some occasions he was given an appointment with a physician but on other occasions he was only permitted to see nurse practitioners. For years he was given inhalation medication, but Kaiser failed to perform diagnostic tests that might have revealed the developing cancer.

Again it is consistent for Kaiser to disregard the safety and the health of its members. Ms. Smith, like the deceased Mr. Engalla, when complaining about the loss of her hearing was given appointments to various physicians, who for nearly six months treated her for sinus infection and common cold. Like Mr. Engalla, they gave no heed to Ms. Smith's continuous complaints regarding her hearing loss. Finally after much insistence to see a specialist, her hearing in her right ear was nearly gone. From March to June 1995 there was a chronic infection in her right ear. At this point so much time had passed, if it were possible to save Ms. Smith's hearing in her right or left ear, whatever the problem was that caused the loss, had already taken effect. Ms. Smith is now totally deaf and dependent on others for simple things. Engalla was not so lucky. He lost his life.

C. WHEN THE ENGALLA'S FILED A DISCOVERY MOTION TO OBTAINED PRIVILEGED DOCUMENTS AND THE COURT FURTHER FOUND THAT THE ARBITRATION AGREEMENT WAS OVERBOARD, UNCONSCIONABLE AND A VIOLATION OF PUBLIC POLICY, SHOULD KAISER HAVE ARGUED THAT THE AGREEMENT COULD NOT BE AVOIDED ON GROUNDS OF FRAUDULENT INDUCEMENT?

Engalla v.. Kaiser Permanente Medical Group, Inc. 15 Cal 4th 951; -Cal Rptr. 2nd; -P. 2nd-June-1997--Page 954 No. 8 FRAUD AND DECEIT & 2 -Actual FRAUD-ELEMENTS. -Lazar V. Superior Court (1996) p. 974. The element of fraud that will give rise to a tort action for deceit are: (a) misrepresentation (false representation, concealment, or nondisclosure), (b) knowledge of falsity (or "scienter"), (c) intent to defraud, i.e., to induce reliance, (d) justifiable reliance, and (e) resulting damage.

The element of fraud and deceit continues. Once Kaiser realized that Ms. Smith had the ability to fight back, they concocted a situation in retaliation to Ms. Smith's solicitation of the flyers. Kaiser created another stress situation resulting in damage and misrepresentation when they began to harass Ms. Smith by sending falsified statements that inferred that Ms. Smith owed them monies and demanded payment. They then referred the matter to a collection agency. (HCS, Inc. 301 Mission Street 5th Floor San Francisco, CA. 94105-2243). Their authoritative powers have allowed them to run rampant. Kaiser was responsible for Ms. Smith's credit problems in 1994 and 1995, so they created another situation for 1996 to ruin her credit once again.

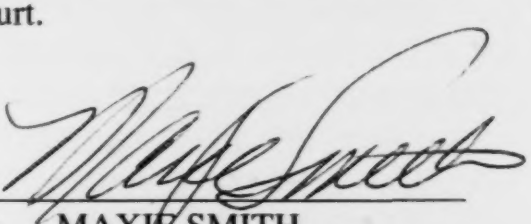
D. WHEN ON FEB. 21, 1992 THE ENGALLAS FILED THEIR COMPLAINT IN ALAMEDA SUPERIOR COURT ALLEGING IN ADDITION TO THE UNDERLINED MAL-PRACTICE CLAIM, FRAUD AS THEIR DEFENSE TO ENFORCEMENT OF THE ARBITRATION PROVISIONS OF THE SERVICE AGREEMENT (HEREAFTER ARBITRATION AGREEMENT) AND AS A BASIS OF AN AFFIRMATIVE CLAIM FOR DAMAGES, AS WELL AS VARIOUS CLAIMS RELATED TO THE BREECH OF THE ARBITRATION AGREEMENT, ON MARCH 20TH SHOULD KAISER HAVE HAD THE RIGHT TO REMOVE THE CASE TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA CLAIMING THE ACTION WAS SUBJECT TO THE RULES OF FEDERAL PREEMPTION CONTAINED IN THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (29 U.S.C. 1132, 1144).

Rowland v. Paine Webber, Inc. (1992) 4 Cal App. 4th 279, 285-286 (6 Cal Rptr. 2nd 20). The court appeared to have followed their reasoning that a court must only determine whether there are facts supporting the allegations of fraudulent inducement.

Ms. Smith has a case with Kaiser Permanente regarding her hearing loss with an agreement to arbitrate. Ms. Smith feels that two pending arbitrations, one for malpractice and one for emotional and financial consideration regarding her credit dilemma is a vehicle that permits Kaiser to take unfair advantage of her. This was Ms. Smith's argument for RECONSIDERATION in the Superior Court of Alameda. Honorable Judge Joseph J. Carson denied reconsideration and allowed the original decision to stay.

CONCLUSION

The evidence presented in Maxie Smith V. Kaiser reveals misrepresentation, concealment, falsity, and an intent to defraud i.e., to induce reliance should now be perfectly clear to the court.



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APPENDIX A

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION ONE

No.080262

MAXIE SMITH,

Plaintiff-Counter
Defendant-Appellee,

v.

KAISER FOUNDATION HOSPITAL, etal.,

No. 770861-5

MAXIE SMITH,

Plaintiff- Counter
Defendant - Appellant,

v.

KAISER FOUNDATION HOSPITAL, etal.,

Defendant-Counter
Claimant-Appellee.

Appeals from the First Appellate District
Division One
for the Northern District of California

Before Joseph J. Carson, Superior Court Judge:

These consolidated appeals arise from action brought by Maxie Smith against Kaiser Foundation Hospital under the KNOX KLEEN HEALTH CARE SERVICE PLAN ACT (Health and Safety Code ,& 1367, subd.(h)Ms. Smith alleged that Kaiser was violating the subscribers' right to be fair, reasonable , and consistent with the objective of the statue of their health plan. The

Superior court granted judgment in favor of Kaiser on the issues that the contract was binding due to the clause, "all claims".

I. BACKGROUND

A. Facts

When Ms. Smith couldn't sell her house, she became desperate and called TRW and told them that Kaiser was responsible for the debt. They told Ms. Smith if Kaiser was responsible, they had to put it in writing, which Kaiser never did. So, Ms. Smith called the collection bureau to take it off. They were the representative of the Medical Regional Ambulance Service. They also ignored Ms. Smith. Then Ms. Smith sought help from a legal assistance program sponsored by the Small Claims section of the court system of Alameda County where she was informed of a new law (Civ. Code 1785.31). She then wrote to the Department of Justice, John Van Dusen, Analysis, and then sued San Jose Collection Bureau but lost. However, when San Jose Collection Bureau went to Court, they had removed the negative credit from Ms. Smith's credit report. The Justice Department was in close contact with the matter, so the Collection Bureau wrote the Justice Department that Ms. Smith had lost the case but as a "public relations matter," they had removed the negative report and then sent a copy to Ms. Smith.

September 16, 1996 Case Management Conference: Ms. Smith wanted to remove San Jose Collection Bureau from the original filing because if they had not removed the negative credit mark from her credit report, very possibly she would have lost everything. A motion was made to take San Jose Collection Bureau off the original law suit. The motion was granted.

II. PROCEDURAL HISTORY

A. Subscriber Action

A letter dated September 6, 1995 from Ms. Smith to Kaiser regarding her injury and credit rating, she told them that they were in violation of their agreement and an offer to come to terms. Kaiser did not respond.

B. Citizen Suit Attempt

An attempt for a citizen suit was made by soliciting with flyers on the streets in hopes of gathering enough signatures and complaints to file a civil suit against Kaiser, but the amount of signatures needed failed. (1) However, a letter dated October 19,1995 from a Ms Jill Carlos-Valentine and a letter from Edna Jamison dated October 2, 1995, encouraged Ms. Smith to proceed knowing there were others with similar experiences as hers.

APPENDIX B
CHRONOLOGY OF COURT PROCEEDINGS

1. In The Superior Court Of The State Of California, In And For The County Of Alameda, Judge, Joseph Carson

July 17, 1996	Complaint for Damages: Demand for Jury Trial	Filed
Dec. 18, 1996	Answer to Complaint	Filed
March 21, 1997	Notice of Defendant's Petition to Compel Arbitration and Stay of Action	Filed
April 16, 1997	Reply in Support of Petition to Compel Arbitration and Motion for Stay of Action	Filed
June 11, 1997	Rebuttal to Rebuke the	Filed

	Petition to Compel Arbitration and Motion for Stay of Action	
June 13, 1997	Order Granting Defendant to Arbitration and Stay of Action	Filed
June 17, 1997	Motion for Reconsideration of Decision	Filed
June 24, 1997	Notice of Entry of Order Granting Defendant's Petition to Compel Arbitration and Stay Action	Filed
July 3, 1997	Opposition to Motion for Reconsideration	Filed
July 22, 1997	Rebuttal of Defendant for Consideration	Filed
July 25, 1997	Motion for Consideration	Denied

2. California of Appeal, First Appellate District, Div. One.

Sept. 30, 1997	Notice to Appeal	
Oct. 24, 1997	Motion to Appeal	Denied
Nov. 24, 1997	Petition for Re-Hearing	Denied
Dec. 24, 1997	The 10/24/97 Decision for California Court of Appeal Becomes Final	

3. California Supreme Court

Dec. 24, 1997	Petition for Writ of Prohibition and/or Nandamus	Filed
Dec. 30, 1997	Supreme Court Transfer to	

	the Court of Appeal, First Appellate District
Jan. 8, 1998	Court of Appeal Denied Writ of Mandamus

APPENDIX C
CORRESPONDENCE AND DOCUMENTATION

1. **Letter dated June 20, 1995, from Kaiser Permanente Medical Center, Oakland, to "Whom It May Concern", re: Maxie Smith, MR 7957592**: "The above patient was transported via ambulance to Kaiser Permanente Medical Center in Oakland on December 23, 1993. Due to an technical error this transport was not paid in a timely manner by Kaiser Permanente Medical Center. Please see the attached to confirm that Kaiser Permanente issued payment to Regional Ambulance Company in the amount of $623.79 on December 7, 1994. s/Virginia Body

2. **Letter dated August 25, 1995 from TRW, to Don Reynolds of MAGNA, 310 Towsend St., San Francisco, re: Maxie Smith, ID #5965038177631676**: "Please accept this letter as confirmation that the below referenced item is currently being investigated on Maxie Smith's TRW Credit Profile. This accounts has been paid by Ms. Smith's insurance company. The Collection Bureau San Jose has refused to update this account.
Collection Bureau San Jose, Acct. No. 3369729.
s/Sandra Greene, National Consumer Assistance Center.

3. **Letter dated July 18, 1995, from Maxie Smith, to Collection Bureau San Jose, re: account Number 3369729**: "This letter is in regard to the above-referenced account which I have been attempting to resolve, without success, for over a year.

I received correspondence from TRW dated July 7, 1995 confirming that you had been instructed to remove the negative credit report relating to this account. (Kaiser paid the bill in question in December 1994.) Nevertheless, the negative credit report by your organization, which is wholly incorrect, continues to appear on credit reports to this day.

On July 18, 1995 I spoke to a TRW representative and was advised that, despite evidence that I was not responsible for the debt, and that the debt had been paid, you "flatly refused" to take this negative history off my credit report.

Your willful misconduct in this regard has caused me financial embarrassment, damage to my reputation, severe emotional distress and inability to secure a personal loan in an amount of not less than $20,000. Indeed, your misconduct constitutes a willful violation of the California Civil Code Section 1785.20 et seq.; thus, under California Civil Code Section 1785.31 I am entitled to recovery of these damages, as well as punitive damages, as a matter of law.

In order to forgo the necessity of civil litigation, in which you will be forced to pay my attorneys fees, I am willing to settle this dispute under the following terms: (1) immediate correction of my credit history; (2) a letter of apology; and (3) the sum of $5,000.00.

This offer to settle will remain open until July 31, 1995. x/Maxie Smith

4. **Letter dated May 24, 1996 from Kaiser Permanente, Oakland to Maxie Smith, re: Amount due $2,074.95**: "Please be advised that unless this office receives payment in full on the above delinquent account within the next five (5) days, your account will be assigned to an outside collection agency with the

authorization to pursue further. s/Doris Munoz, Patient Accounts Receivable Department.

5. **Letter dated October 10, 1996, from Maxie Smith to Kaiser Permanente Regional Legal Dept., Oakland**: "This letter is to inform you that I, Maxie Smith, hereby demand arbitration with respect to my claim for total hearing loss resulting from Kaiser Permanente Medical Group's delayed or misdiagnosis.

I was examined and treated repeatedly by Dr. Thomas Sharpton at Kaiser-Oakland with complaints of vertigo, tinnitus and increase in hearing loss. He placed me on a number of antibiotics and steroids. Due to a complete misdiagnosis and/or a delay in the proper diagnosis, as well as the incorrect and untimely treatment of my ailment, I suffered a complete and total hearing loss.

At all times herein mentioned, Dr. Thomas Sharpton and others breached the applicable standards of care in the manner in which they examined, diagnosed and treated me while I was under their care.

As a result of this negligent examination and treatment, I lost my hearing. In addition to the loss of my hearing, I have suffered severe emotional distress and have been forced to make substantial, painful and inconvenient accommodations to my lifestyle due to my injury.

At all times herein mentioned, I was unaware of my injury and its negligent cause until I suffered a total hearing loss in both ears in or about April, 1996.

Enclosed is my check for $150 representing my deposit for the arbitration. I do look forward to hearing from you. s/ Maxie Smith.

6. **Letter dated November 18, 1996 from Law Offices of Walkup, Melodia, Kelly & Escheverria, to Marilyn Moffitt, Kaiser Permanente Medical Care**

Program, Oakland, re: Maxie Smith: "Enclosed as Exhibit A are copies of some of the efforts I have made to obtain Ms. Smith's medical records from Kaiser-Oakland.

To date I have yet to receive anything from your office or from the Kaiser Records Department. When we spoke on the telephone you kidded me about being paranoid, perhaps Exhibit A explains my thoughts and feelings in this regard.

Do you plan on providing m e copies of Maxie Smith's records in the near future? As you know, our firm is looking into whether Ms. Smith has a valid medical malpractice claim against Kaiser Permanente Medical Group --- a question we cannot answer without access to her medical records. s/ Erik R. Brunkal: Enclosed Exhibit: Letters dated August 12, 1996, August 30, 1996, October 4, 1996, and October 18, 1996, from Document Copy Service, to Custodian of Records, Kaiser/Permanente, requesting records for Maxie Smith.

7. **Letter dated November 21, 1996 from Kaiser Permanente, Oakland, to Eric R. Brunkal, Walkup, Melodia, Kelly & Echeverria re: Maxie Smith, Medical Record No. 7957592**: "We are sorry for the difficulty you have experienced trying to obtain the medical records in this matter. Enclosed please find a complete copy of Ms. Smith's records which we are providing to you without charge. s/Marilyn A. Moffitt

8. **Letter dated December 10, 1996 from Document Copy Service to Erik Brunkal, Walkup, Melodia, et al., re: Maxie Smith/DCS work order 00254801-02**: "You asked us to obtain records pertaining to Maxie Smith.

We have made numerous attempts to obtain records from Kaiser/Permanente Medical Center. The Custodian of Records has ignored the request for records, our telephone calls, and past due letters.

Attached please find our invoice. s/ Past Due/Appointments Department.

9. **Status Report Letter dated December 10, 1996 from Document Copy Service to Erik Brunkal, re: Maxie Smith medical records**: "We received your request to obtain the records of Maxie Smith from Kaiser/Permanente Medical Center. We have been unable to complete this request. The following is a summary of the actions we have taken:

8/12/96	Request served by mail. Work order refiled in Work in Progress. - S. Sonza
8/2/396	Rep went to the location and was told the record were not ready to copy. The rep was not given an explanation as to why. Will follow up w/location on 8/28/96. M. Eickmann
8/28/96	Spoke with Judy, records still not ready. Follow up on 9-4-96. -A. Santos
8/30/96	First Past Due letter sent to the custodian. Past Due to follow up on 9/4/96. M. Ejanda
9/4/96	Faxed the work order to Shama Lama for status. Follow up on 9-11-96. -A. Santos
9-11-96	Spoke with Linda who said records are still not ready. Follow up on 9-18-96. -A. Santos
9-18-96	Spoke with Linda who said records are still not ready. Follow up on 9-25-96. -A. Santos
9-30-96	According to the field rep, the records are still not ready. Follow up with the location on 10-02-96. -A. Santos
10/2/96	Spoke with Linda who said records are still not ready. Follow up on 10-9-96. -A. Santos
10/4/96	Second Past Due letter sent to the custodian. Past Due to follow up on 10-9-96. -M.

	Ejanda
10-9-96	Spoke with Linda who said records are still not ready. Follow up on 10-16-96. -A. Santos
10-16-96	Spoke with Linda who said records are still not ready. They're way behind of their work right now. Follow up on 10-23-96. -A. Santos
10-18-96	Final Past Due letter sent to the custodian. Past Due to follow up on 10/23/96. -M. Ejanda
10-23-96	Spoke with Linda. Records are still not ready to copy. She's a couple weeks behind with her work. Follow up on 10-30-96. -A. Santos
10-30-96	Spoke with Linda and the records are still not ready. She is still way behind. Follow up on 11-6-96. -A. Santos
11-1-96	Letter sent to client regarding our numerous attempts to obtain records from the location. Order on hold for thirty days. Past Due to follow up on 11/7/96. -M. Ejanda
11/6/96	Spoke with Linda. She's way behind with her work. Records are still not ready. Follow up on 11-13-96. -A. Santos
11-13-96	Spoke with Linda and records are still not ready. Follow up on 11-20-96. -A. Santos
11-20-96	I left a message for the custodian on voice mail/answering machine, asking for an updated status on our request for records. Follow up with Linda on 11-27-96. -A. Santos
11-27-96	I left a message for the custodian on voice mail/answering machine asking for an

updated status on our request for records. Follow up with Linda on 12-4-96. -A. Santos

12-4-96 Spoke with Linda and she said that the records are not ready yet. Follow up on 12-11-96. -A. Santos

12-10-96 Order closed/Made numerous attempts to obtain records from the location. Copy of the letter sent to location. Work order to Lynn for bill out. -S. Sonza

Our invoice is attached. Thank you for your order.
s/Customer Service Department

10. **Letter dated November 19, 1996 from Law Offices of Walkup, Melodia, Kelly & Echeverria, to San Jose Collection Bureau, Attn: Roger Young, Re: Smith v. Kaiser Permanente, Acct. # 3369729**: "This letter is pleased to represent Maxie Smith in her claims against Kaiser Permanente Medical Group. I am informed and believe that your organization attempted to collect a debt from Maxie Smith which should have been rightfully paid by KPMG.

The bill was for an ambulance ride in December, 1993. Eventually, Ms Smith defaulted and you sent a report of her default to TRW.

I am writing to discover how many times you contacted KPMG both in writing and via telephone during your efforts to collect on this debt. In addition, I am also interested in the response KMPG gave you each time you contacted them.

Current, my client is suing Kaiser for failure to honor their health care contract with her. Kaiser is defending this claim by contending it was an oversight and they did not realize (i.e., they never had notice) that they

owed the ambulance company and eventually San Jose Collection Bureau, any money for Maxie Smith's ambulance ride. Thus, whether you contacted Kaiser at all, and if so, how often, as well as Kaiser's response will be crucial to Ms. Smith's case against her health insurance company. Will you please call or fax me a response at the above fax number either today or tomorrow. s/ Erik R. Brunkal

11. **Letter dated November 29, 1996 from Collection Bureau of San Jose, to Erick Brunkal, Esq., Walkup, Melodia, Kelly & Echeverria, re: Maxie Smith**: "Pursuant to the conversation of 11/25/96 with your client Maxie Smith, and in compliance with her request, this is the following information requested: -Regional Medical Systems informed CBSJ. Kaiser denied non-member. CBSJ billed Kaiser 12-06-94. Kaiser paid 12-30-94. Three calls were made to Kaiser regarding payment. s/Roger Young, Director of Collections

12. **Letter dated February 19, 1997 from Kaiser Permanente, Oakland, to Erik R. Brunkal, Walkup, Melodia, etal re: Maxie Smith**: "I note that I sent you a copy of Mrs. Smith's medical records in November 1996. Could you please let us know if you have decided whether to formally represent Mrs. Smith so that we can decide what steps should be taken next and whether we may contact Mrs. Smith direct.
s/ Marilyn Moffitt

13. **Letter dated June 13, 1997, from Kaiser Permanente, Oakland, to Maxie Smith**: "Your records have now been reviewed by our internal consultant who has concluded that your treatment at Kaiser was within the community standard. We would therefore like to determine at this time whether you wish to proceed with your Demand For Arbitration. If you intend to continue,

we intnend to proceed with the designation of arbitrators in this case. Accordingly, we have selected the following attorney as our party arbitrator: Wiliam C. Judge, Esq., Sedgwick, Detert, Moran & Arnold, 1 Embarcadero Center, 16th Fl., San Francisco, CA 94111.

Please advise me of the name of your party arbitrator within 30 days of the date of this letter.

In the alternative, we can dispense with the need for party arbitrators and proceed with a single neutral arbitrator if you are willing to limit your damages to not more than $200,000. Enclosed is a stipulation for you to sign in that regard. If you elect to sign it, please return it to me within 30 days of the date of this letter. After I receive the signed stipulation I will immediately withdraw my party arbitrator, and we can then commence the process fo appointment of a neutral arbitrator.

If we do not hear from you, as indicated above, within 30 days of the date of this letter, we iwll assume you wish to dismiss your case and we will close our file.

s. Marilyn A. Moffitt

14. **Letter Dated March 7, 1997 from First National Mortgage Company to Maxie Smith**: "In accordance with my telephone conversation of March 6th, relating to your loan inquiry in June, 1995, please be advised according to Mr. Moon's recollection, the reason your loan inquiry was not completed, was owing to judgments and credit collections. s/Gayle H. Lewis, President

15. **Letter dated September 6, 1997 from ?? to John Van Dusen, Analyst, Public Inquiry Unit, Sacramento:** "I am in receipt of your letter dated September 1, 1995 regarding Maxie Smith's complaint filed against Collection Bureau of San Jose.

I apologize for the length of time it has taken to respond. Several things have transpired over the past few

weeks in regard to this inquiry. One of them being all parties involved appeared in small claims court on August 31, 1995 in Oakland, California. The court found in favor of Defendant, Collection Bureau of San Jose.

The Plaintiff, Maxie Smith, misinterpreted the Fair Credit Reporting Laws and felt she had a justified complaint against the agency. The court found in the favor of the agency. The plaintiff's debt had been paid in full by the insurance company, one year after service and the credit reporting remained on file as a paid account. For public relations reasons we have removed the credit report. I have enclosed copies of the Notice of Entry of Judgment and your letter dated September 1, 1995. s/ Eleni Krieger, Executive Assistant

APPENDIX D
AFFIDAVITS AND LETTERS OF TESTIMONY

1. **Letter dated October 19, 1995, response to advertising**: "To Whom It May Concern, Last year my two year old son was running and fell, head first, into our entertainment center. He had a severe and deep cut to his forehead which instantly started swelling and bleeding profusely like head wounds always do. My husband at that time was home alone with our children. He knew he couldn't drive our five-speed stick shift car and keep pressure on our son's head, so he called 911. The fire department was the first to respond and my son was very upset and crying loudly, when suddenly he became very quiet and his eyes started closing and his head was bobbing. It was at that point that the fire department made the decision to dispatch the ambulance. They felt it was necessary.

My son had to be checked out by two different doctors because it was so deep. He ended up with six stitches internally and 7 stitches externally.

Now Kaiser has refused to pay for the ambulance bill, and on top of all that, they sent me to collections! We even wrote an appeal letter to Kaiser and again we were denied.

Thank you for any help you can give us. s/ Jill Carlos-Valentino, 6 Harder Rd., #5, Hayward, CA 94544, 510-58101709

2. **Letter dated October 2, 1995 in response to ad**: "To Whom It May Concern, I am a member of Kaiser. I was at Kaiser for an appointment and was handed one of your fliers. After reading the message, I decided to write you because this happen to me April 20, 1994.

Kaiser did refuse to honor the payment of my ambulance bill. I took Kaiser to small claims court and lost. I even went through their grievance process and lost. So I am just at a loss to getting this bill paid. I will be more than honored to be a part of your suit against Kaiser. s/E. Jamison, One Excelsior Ct., #104, Oakland, CA 94510

3. **Declaration of Mary J. Shea, dated August 22, 1995**: "1. I am an attorney at a law duly licensed to practice law in the State of California. I have personal knowledge of the matters set forth in this Declaration and could competently testify thereto if called as a witness. 2. On Christmas Eve, 1993, I was leaving my apartment (525 Mandana Boulevard, Apt. 104, Oakland, California 94610) and was heading toward the elevator on the first floor, when I cam e upon my neighbor, Maxie Smith, who was lying in the hallway in her nightclothes and was gasping for air. I immediately rushed to her attention and she told me that she was light-headed and could not

breathe. She was also concerned that her blood pressure was going up. I went into Ms. Smith's apartment and insisted that she lay on the couch. I stayed with her for a few moments to see if she would start to feel better. Ms. Smith told me that she thought she may have ingested some toxic fumes, but was not sure what was causing her light headiness and shortness of breath. I became concerned when it was apparent that her condition was worsening and I insisted on calling an ambulance. Ms. Smith was reluctant to call an ambulance and I was afraid to leave her alone. I then called an ambulance and stayed with Ms. Smith until they arrived. I observed Ms. Smith showing the paramedics her medical card and I stayed with Ms. Smith until she entered the ambulance. Once I was sure that Ms. Smith was in the safe hands of the paramedics, I proceeded to go to my parents' house with my sister, brother-in-law, niece and nephew.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on August 22, 1996, at Oakland, California.
s/Mary J. Shea

4. **Declaration dated October 21, 1997 by Frances L. Criswell, RN, BSN re: audiological evaluation of Maxie Smith**: I am a registered nurse for the State of California, license Number RN229425, expiration date, November 1997. I was retained by Ms. Maxie Smith to interpret her medical records from Kaiser Permanente Hospital. June 27, 1995 Ms. Smith had an audiological evaluation which noted a difference of her hearing, left greater than rgith (page 55 of medical records.) Ms. Smith said with each visit to Kaiser she was constantly complaining about her ears and hearing. She told me that they only addressed the problem with her sinuses for six months and after six months of complaining finally an

MRI showed fairly extensive right mastoid air cell disease with minimal change noted inferiorly on the left (page one of MRI Report.) After March an infection to her right ear is mentioned frequently by subsequent doctors (pages 49, 50, 52, 53, 54 of Kaiser's medical records.) Ms. Smith was not seen by a specialist until June 27, 1995. s/ Frances L. Criswell, Rn, BSN

APPENDIX E
MEDICAL DOCUMENTATION CHRONOLOGY

12/24/93	Paperwork regarding transport with Regional Ambulance Co.	Pg. 28 of Kaiser file
12/24/93	Emergency Services instructions for transport with Regional Ambulance Co.	Pg. 29 of Kaiser file
12/24/93	Treatment permit, Release & Admission agreement	Pg. 30 of Kaiser file
12/24/93	Emergency Room Evaluation	
12/24/93	Kaiser invoice	
1/23/94	Kaiser lab test, infection not found	
2/27/95 through 6/15/95	Kaiser treatments for cold & sinus; not treated for infection	Kaiser records
5/3/95	Consultation regarding signs of infection in right ear frequently mentioned reports; but no treatment	Dr. Sharpton
5/13/95	Routine checkup; Patient insists on ENT referral (considered routine, appointment would take six weeks)	Kaiser records

6/27/95	First appointment with specialist, Dr. Frederick M. Byl who requests audiological evaluation and MRI
7/7/95	MRI appointment
7/18/95	MRI follow-up consultation with Dr. Byl. (Could not determine cause of hearing loss.)
10/5/95	Byl referral to Linda Hanna, audiological services.
1/19/96	Lab report from Dr. Nieberding. (sign of infection)